No. 18269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



BEATRICE RAUCH, a Widow,

Petitioner,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON,

Respondent.

PETITION FOR REHEARING



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TO THE HONORABLE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The petitioner herein respectfully prays for a rehearing by the Court en banc and a reversal of the decision of this Court of July 8, 1963, Cause No. 18269, which affirmed the order of the District Court dismissing petitioner's action with prejudice. Petitioner prays for rehearing en banc for the following reasons:

FIRST

The District Court, in its Pre-Trial Order, ruled "that the laws of the State of Washington shall apply to the construction of the insurance contract."

The majority opinion makes no mention of any Washington cases, and does not interpret appellee's contract by the rules of construction enunciated by the Supreme Court of the State of Washington.

Subsequent to oral argument before this Court, but before its opinion, by letter dated May 7, 1963, counsel for appellant invited this Court's attention to the most recent opinion of the Supreme Court of the State of Washington, Thompson v. Ezzell, Vol. 161, No. 15, page 683, Washington Decisions, which reiterated certain basic maxims utilized by that Court in interpreting contracts of insurance.

1. It is the established rule in this State that where a provision of insurance is capable of two meanings, or is fairly susceptible of two different constructions, that meaning and construction most favorable to the insured "must be applied", even though the insurer may have intended another meaning (p.686).

2. The language of insurance policies should be interpreted in accordance with its ordinary meaning.

3. Exclusionary clauses in insurance policies are to be "very strictly" construed against the insurer.

There is nothing in the majority opinion indicating that these Washington rules were applied to the instant case. The Missouri Court in the Wendorff case, relied upon by the majority, obviously applied its own rules of construction which are not necessarily identical with the maxims of constructions required in the State of Washington.

In oral argument to the Court, counsel for appellant cited Bruener v. Twin Cities Fire Insurance Co., 37 Wn.(2d) 181, which case had not been listed in appellant's brief. In that case the Washington Court overruled a previous opinion, and adopted what it considered to be the better reasoned rule, i.e., in insurance contract cases "proximate cause" has a

different meaning than when used in tort. It holds that insurance cases are not concerned with why the injury occurred, but only with the nature of the injury (p. 184). Applying this Washington rule to the instant case, the Court should only be concerned with the fact that the insured drowned, and should not be concerned with the causation problem of the circumstances which put him in the water.

To embrace the death of the insured after the aircraft accident, the insurance contract must be expanded by words the parties did not use, and be given a meaning which its words do not impart - incompatible with Washington rules of construction.

SECOND

The main brace in the framework of the majority opinion is Wendorff v. Missouri State Life Insurance Co., 1 S.W.(2d) 99, decided by the Supreme Court of Missouri, 1927, before the McDaniel and Eschweiler decisions of the Seventh Circuit. In Wendorff the exclusion clause read as follows:

> "The insurance hereunder shall not cover injuries fatal or non-fatal . . . sustained by the insured . . . while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith or while operating or handling any such vehicle or device." (The underlined portions are not found in appellee's contract of insurance.)

Language in the Wendorff opinion [10] IV, p. 103, makes it appear that the decision of that Court was based upon exclusionary language found in that contract, underlined above, but absent in the instant case.

> ". . . the law would regard drowning as the efficient, predominant cause of death. But a subsequent clause specifically excepts accidental injuries, fatal or nonfatal, sustained in falling from a machine for aerial navigation. If the insured had fallen from

> an airplane to the ground, and been killed, the applicability of the provisions would hardly be questioned, and this without regard to whether the plane was in the air or falling along the ground at the beginning or ending of a flight. We can see no reason why the exception should not be equally binding under the facts here. The ultimate cause of death in the one case would be crushing, in the other it is drowning; but both would result from the same producing cause - falling from a flying machine."

Further, the cases of Walden v. Auto Owners Safety Ins. Co., 311 S.W.(2d) 780 (Ark.), and Wright v. Aetna Life Ins. Co., 10 F.(2d) 281 (Pa.), cited in the majority opinion, are not absolute authorities for interpretation of the word "while", for the reason that both Courts applied the universal rule that language, susceptible of two meanings, shall be construed most favorably to the insured. In both cases the Courts made a liberal construction in finding for the insured. On the other hand, the Court in McDaniel, infra, made a literal construction in finding for the insured.

THIRD

The majority opinion made only passing reference to the two opinions of the United States Court of Appeals for the Seventh Circuit which were more closely in point than any others cited (McDaniel v. Standard Accident Insurance Company, 221 F.(2d) 171, and Eschweiler v. General Accident Fire & Life Assurance Corp. Ltd., 241 F.(2d) 101). Both cases interpret similar language, i.e., "while operating an aircraft." The result is that in the Seventh Circuit a beneficiary prevailed while in the Ninth Circuit, in the instant case, under basically similar facts, the beneficiary failed.

## CONCLUSION

For the foregoing reasons, we respectfully urge this Court to grant a rehearing en banc in order to give effect to the decisions of the Supreme Court of the State of Washington and to avoid a different interpretation than that found in the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I, WALTER R. RODGERS, III, Counsel of Record for Petitioner, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated this 1st day of August, 1963.

WALTER R. RODGERS, III
Attorney for Petitioner